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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY CHAN SAECHAO,

Defendant and Appellant.

C065775

(Super. Ct. No. 08F02348)

Following a jury trial, defendant Billy Chan Saechao was convicted of second degree murder (Pen. Code,¹ § 187) with firearm and street gang enhancements. (§§ 12022.53, subds. (b)-(d), 186.22, subd. (b)(1).) The trial court sentenced him to 50 years to life.

On appeal, defendant contends: (1) the trial court failed to instruct the jury on a self-defense theory; (2) instructions allowing the jury to consider defendant's pretrial statement

¹ Undesignated statutory references are to the Penal Code.

violated his due process by lowering the prosecution's burden of proof; and (3) instructions allowing the jury to consider his subsequent effort to hide evidence violated his due process rights. We find an error in the abstract and affirm the judgment.

FACTS

In March 2008, Gnia Lee² and his sister Jeanie lived in their parents' south Sacramento house. Jeanie invited four of her girlfriends -- Tracey Yang, Shari, Nai, and Mey Saechao -- over for an outdoor party. Gnia spent the night indoors, while other members of his family (brothers Ki and Ker, cousin Koua, relatives Steve and Roger Lee, and Steve Chang) and Ki's friend Teng Xiong were at the party.

Mey, Shari, and Nai decided to go home, and Mey called her boyfriend, defendant, to pick them up. Defendant was at a nearby party with his friends Thanhdat Chau, Joe Duong, and Tim Saetern. Defendant told Mey he would come and get her; Mey had Yang give him directions. Jeanie, Mey, and their girlfriends went out front to wait for the ride.

Koua, Xiong, and Chang decided to leave the party at around the same time. As they were getting into Koua's car, defendant's group drove up to the residence. According to Yang, Koua's group exchanged words with defendant's group while they

² Many of the participants in the incident share a last name. For the sake of clarity, we refer to those who share last names by their first names.

crossed the street. The exchange was not friendly, and the two groups exchanged gang words. Suddenly, shooting erupted between the two groups. Yang saw defendant fire first, and Koua fire back many times.

Xiong testified that he was out front drinking when a white Acura drove by, made a u-turn, and parked about half a block up the street. Koua was across the street in his car. Ki was inside the house, but came out when the Acura showed up. The occupants got out of the Acura and started making gang signs while yelling out for their gang. Two of the Acura's occupants then started shooting. Xiong was shot in the left hip and fell to the ground. He was shot by defendant.

Ki was in the backyard when he heard three or four shots. Ki ran to the street, where he saw Koua in his car, Xiong lying on the grass, and a person in a black sweater running away. Ki then fired two shots into the air to scare people, and threw his gun, a .22 caliber semiautomatic pistol, into the bushes. Ki denied being a member of a Crip gang, but admitted Crip graffiti was in front of the house.

Gnia was inside when he heard at least three or four shots from the front of the house. He ran outside, where he heard people screaming that Xiong was shot. Gnia grabbed Xiong, who was lying in the neighbor's yard and said he was shot and going to die. When Steve Lee said Koua had been shot, Gnia ran across the street to Koua's car, where he found Koua in the driver's seat, bleeding from the lower chest and unresponsive.

Emergency personnel pronounced Koua dead at the scene. Police found Koua in the driver's seat of a white Volkswagen sedan parked across the street from the house. A .9mm Smith and Wesson semiautomatic pistol was in the driver's seat. The pistol had no ammunition and the slide was in the locked back position, suggesting it was fired until it ran out of bullets. Koua died of a single gunshot that went through the skin and tissue of his forearm, penetrating his heart and liver before stopping in his abdominal cavity. He could reason and move for about 30 seconds after sustaining the fatal wound, enough time to fire a weapon and move to his car.

Police found 26 .9mm cartridges at the scene, of which 15 were fired from Koua's gun. Officers found two .22 caliber cartridges, which were fired from Ki's gun. Koua was killed by a .380 caliber bullet that matched a .380 caliber casing found at the scene.

Duong testified that defendant's group had problems finding the place as they drove to pick up Mey. They eventually drove past the home, made a u-turn, and parked. The four males got out of the car and walked towards the house; as they approached they saw at least three males in a white car across the street. The occupants of the white car looked really hard at defendant's group, like they were "mean mugging" them, a gang term for challenging someone by staring them down.

The two groups exchanged words. Duong believed the other group said something first, like, "What's up, Cuz," which could be taken as an insult. Defendant said the same phrase back to

them. The other group then got out of the car, pulled out guns, and shots were fired. Duong did not see who fired first.

People scattered and ran after the shots were fired. Duong's group met at a friend's house, where defendant admitted shooting somebody. Duong admitted he was once labeled as a member of the Asian Boys' Society gang. An exchange of hard looks can cause a gang member to expect violence, as can a "mean mugging" followed by an exchange of words.

Saetern drove defendant, Duong, and Chau to pick up his cousin Mey. He initially stayed in the car as the other three got out. People started shooting at them by the time Saetern got out of the car and walked to the house. He took off running when shots were fired.

Chau, a member of the Outlaw Crip gang, testified that someone from the other group said, "What's up" and someone from their group said something back. As they were talking to a girl, a man from the other group pulled out a gun and started firing at them. Chau was shot in the leg as he ran away, but managed to keep running. He admitted telling the police he was not sure how many shots defendant fired, although he testified that he did not know if defendant had a gun.

Sacramento Police Detective John Fan testified as an expert on Asian street gangs. Defendant was a member of the Mien Pride Gangsters (MPG) at the time of the incident. The MPG were Crips, whose primary rivals were the Khome Zing Tong, Flat Dog Crips, and Menace of Destruction. Koua was a member of True Blue, another Crip gang.

True Blue was not associated with MPG; MPG had Mein membership, while True Blue was composed of Hmong members. Saetern, Chau, and Duong were not validated MPG members at the time of the incident, but some of them became validated with the gang as a result. Ki was a member of True Blue.

Respect is essential in the Asian gang subculture, and a loss of respect diminishes credibility for the person and his gang. Respect is regained through violent acts, sometimes extremely violent acts. However, Asian gangs rarely engage in one-on-one fighting. It is an unspoken rule that a gang member is expected to back up another gang member in a conflict.

"Mean mugging" or giving someone a hard look is a challenge. Such a challenge is the start of many violent crimes, because a person loses respect if he walks away from a "mean mugging." The phrase, "What's up Cuz," identifies the speaker as a Crip, and can be a challenge if said to a stranger.

In Detective Fan's opinion, if a group of gang members enters unknown or hostile territory and responds to a "mean mugging," it is likely the confrontation would escalate to armed conflict if the participants were armed. It is extremely rare to have fistfights between two Asian gang members, and Detective Fan has never heard of a fistfight breaking out when an armed gang member in hostile territory confronts someone over a "mean mugging."

Defendant was interviewed by the police one day after the incident. His girlfriend wanted him to pick her up from the party because people there were drunk and touching her. He

believed there would be a fight, so he kept his gun at the ready as he traveled to the party. He was angry because his group did not get good directions on how to get to the house.

Defendant's group exchanged words with the other group after they arrived. The participants were "mean mugging" each other, and defendant removed his jacket in anticipation of a fight. He thought the other men were members of a rival gang, and he wanted to back up his friends.

According to defendant, the other group shot first, and he returned fire with his .380 caliber gun. He fired twice in the air, learned his friend Chau was shot, and fired four shots at the other group. Defendant claimed that he shot in self-defense.

Later in the interview, defendant admitted his friend Duong started the confrontation. He also admitted that he might have fired first. Defendant was a member of MPG.

Defendant fled with Chau and threw the gun into a creek. Later, he retrieved the gun, cleaned it, and threw it into the Sacramento River. He also cut his hair to change his appearance.

DISCUSSION

I

Jury Instruction on Self-Defense Theory

Defendant contends the trial court was required to instruct the jury that defendant retained his right to use deadly force in self-defense if he provoked an argument he thought would lead

to a fistfight, but the other side responded with firearms. We disagree.

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citation.]" (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) The trial court must include sua sponte instructions "'on particular defenses and their relevance to the charged offense . . . only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) However, "'the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' [Citation.]" (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

Defendant's claim is based on *People v. Quach* (2004) 116 Cal.App.4th 294. *Quach* involved numerous inconsistent accounts of a dispute between two groups of rival gang members outside a bar, with defendant injuring a rival gang member in the ensuing shootout. (*Id.* at pp. 297-298.) The jury was instructed under CALJIC No. 5.56 that the right of self-defense is not available to a person engaged in mutual combat unless

that person tries to stop fighting, informs the other person of his intention to stop, informs the other person he has stopped fighting, and gives the opponent the opportunity to stop fighting. (*Id.* at p. 300, fn. 2.)

The *Quach* court mentioned in passing that “[t]he jury could quite reasonably have concluded this was a mutual combat situation.” (*Quach, supra*, 116 Cal.App.4th at pp. 300-301.) The Court of Appeal held it was prejudicial error for the trial court to give the instruction on mutual combat without also instructing that “[w]here the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If the victim uses such force, the aggressor’s right of self-defense arises.” [Citation.]” (*Id.* at p. 301.)

Defendant argues his situation is indistinguishable from *Quach*. Defendant told the police he thought the confrontation would lead to a fight, and so he took his jacket off during the initial confrontation. Several witnesses testified that the other side fired first. Since the jury was instructed with CALCRIM No. 3472 that defendant does not have a right to self-defense if he provoked a quarrel with the intent to use force, defendant asserts the jury was precluded from considering his right to self-defense even if he provoked an argument without intending to use lethal force.

The rule in *Quach, supra*, 116 Cal.App.4th 294 is predicated on some combat short of lethal force that then escalates into lethal force. Although defendant’s statement to the police

indicated he might have anticipated a fistfight rather than a gun battle, there is no evidence of a fistfight or any other assault taking place before the gun battle. Since this case does not involve mutual combat, *Quach* is inapposite.

Nor, as defendant suggests, was the *Quach* scenario the theory of the defense. Defense counsel argued to the jury: "Koua Lee and his side provoked this quarrel. [Defendant] did not set out to kill Koua Lee. He didn't deliberate or carefully consider his choices. This quarrel started with what? Koua Lee mean mugging. [¶] . . . [¶] It ended with Koua Lee, and possibly others -- because we had more than one witness say that there [were] at least three guns on their side -- pulling out his 9mm semiautomatic handgun and putting [defendant] in immediate danger of great bodily injury or death."

The trial court instructed the jury on defendant's theory, that Koua was the aggressor, whom defendant shot in self-defense. Neither the evidence nor the theory of the defense supported an instruction on defendant retaining his right to self-defense if he intended to provoke a nonlethal confrontation. We conclude there was no error on the self-defense jury instruction.

II

Jury Instruction on Defendant's Pretrial Statement

The trial court instructed the jury with CALCRIM No. 359, delivered as follows: "The defendant may not be convicted of any crime based on his out-of-court statement alone. Unless you first conclude that evidence other than defendant's out-of-court

statement shows someone committed the charged crime, you may not rely on any out-of-court statement by the defendant to convict him. The other evidence may be slight and need only be enough to support a reasonable inference that someone's criminal conduct caused an injury, loss, or harm. The other evidence does not have to prove beyond a reasonable doubt that the charged crime actually was committed. The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statement alone. You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Defendant contends this instruction violated his right to due process of law by lowering the prosecution's burden of proof. He asserts his statement to the police was insufficient to prove his guilt beyond a reasonable doubt, and the CALCRIM No. 359 instruction violated due process by allowing the jury to find him guilty based on his statement and "slight" corroborating evidence.

Essentially the same argument has been rejected by the California Supreme Court with respect to the similar CALJIC No. 2.72 instruction, which reads: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him or her outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or

degree of the crime may be established by a confession or admission."

The Supreme Court held this "instruction did not relieve the prosecution from proving that defendant committed the charged crimes." (*People v. Frye* (1998) 18 Cal.4th 894, 960, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal. 4th 390, 421, fn. 22.) The same is true here -- there is no reasonable likelihood the jury understood CALCRIM No. 359 to mean that it was unnecessary for the prosecution to prove defendant's guilt beyond a reasonable doubt. Indeed, the sentence following the challenged sentence in the instruction reminded the jury that the standard of proof was guilt beyond a reasonable doubt. Accordingly, there was no instructional error.

III

Jury Instruction on Defendant's Subsequent Effort to Hide Evidence

Pursuant to CALCRIM No. 371, the jury was instructed: "If the defendant tried to hide evidence, that conduct may show he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Defendant claims the instruction violated his right to due process by telling the jury it could convict based on his postcrime conduct without also informing the jury it could acquit defendant based on his conduct after the incident.

Although we agree with defendant that jury instructions must be impartial between the defense and the prosecution (*People v. Moore* (1954) 43 Cal.2d 517, 526-527), defendant's desired result does not follow from this rule.

Defendant's argument relies on *Cool v. United States* (1972) 409 U.S. 100 [34 L.Ed.2d 335]. In *Cool*, an accomplice testified that he acted alone, and that the defendant neither knew about nor participated in the criminal conduct. (*Id.* at p. 101 [34 L.Ed.2d at pp. 337-338].) The trial court instructed the jury that it could accept this accomplice testimony only if it found it true beyond a reasonable doubt. (*Id.* at pp. 101-102 [34 L.Ed.2d at p. 338].) The United States Supreme Court overturned the conviction because the instruction improperly affixed the burden of proof on the accomplice's credibility "[b]y creating an artificial barrier to the consideration of relevant defense testimony." (*Id.* at p. 104 [34 L.Ed.2d at p. 339].)

The challenged instruction does not cover all activities after the incident, instead focusing on a single activity, defendant's efforts to conceal evidence. This instruction was supported by the evidence: after the shooting, defendant threw his gun into a creek, retrieved and cleaned it, and then threw it into the Sacramento River.

CALCRIM No. 371 does not prevent the jury from considering defense evidence, it merely instructs the jury on a permissible inference raised by some of the evidence. The trial court did not have to instruct the jury that it also could consider

defendant's acts after the offense as evidence of his innocence because the evidence did not support this instruction.

Defendant asserts his cooperation with police by consenting to an interview with the police after the incident was evidence of his innocence. This argument overlooks the interview's content. For example, defendant first told the detectives he did not know where the gun was, then later told them, "I just threw the gun somewhere," before admitting he threw the gun into a nearby creek, retrieved the gun, cleaned it, and then threw the gun into the Sacramento River. Likewise, defendant initially denied having a gun, but then admitted he had a gun at the incident. He even admitted he may have fired first. At first defendant said only he and Saetern were in the car, but changed his story when the detectives told him they had talked to the other three occupants of the car. Based on the content of defendant's interview, the interview was not evidence of his innocence. Thus, there was no error on the postcrime conduct instruction.

IV

Correction of Abstract

The abstract correctly identifies defendant's crime as second degree murder but lists the code section for the crime as conspiracy (§ 182, subd. (a).) We order a correction of the abstract to reflect that defendant violated section 187.

DISPOSITION

The judgment is affirmed. The trial court is to prepare an amended abstract of judgment reflecting that defendant was

convicted under Penal Code section 187 and forward a certified copy to the Department of Corrections and Rehabilitation.

HOCH, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.